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Employment Litigation: 3 Instances Where Companies Should Consider Mediation

For most successful businesses, litigation filed by current or former employees is a cost of doing business. The question becomes, how much does it end up costing? Senior executives and in-house counsel are routinely grappling with the dilemma of whether and when to settle employee litigation.

There are various reasons to not settle. A company may not have done anything wrong, and therefore, it does not want to settle purely out of principle. In addition, settling a pending litigation may lead to countless copycat suits from other disgruntled employees. On the other hand, litigation could take years and cost the company hundreds of thousands of dollars in legal fees, if not more, while settling the case early may cost a company a fraction of that legal spend. Companies are therefore constantly struggling with the question: what is in the best interests of the company, and for public companies in particular, their shareholders?

Companies with a significant number of employees often implement an internal “no settlement” policy. When an employment case is filed, they do not even consider settling, mediation, or any alternative to litigation. Instead they immediately engage counsel to aggressively litigate in court for as long as it takes, and for as much as it costs. The reality is, however, only a minority of cases go to trial, which means these companies usually do end up settling at some point—unfortunately, it is typically only after they have incurred significant legal expense and suffered through potentially damaging discovery. For those few who do not settle and continue to litigate through trial, there’s a question of whether that strategy best serves the company’s bottom line?

It is important for companies to recognize that there are instances where they may benefit from mediation, and that they can negotiate without exposing themselves to additional litigation risk. While mediating cases involving these “no settlement” companies are not easy, there are certainly instances where a skilled mediator can help the company overcome its concerns about reaching a negotiated resolution. As a starting point, no settlement is obtainable unless both parties are open-minded and willing to listen. Thus, the reasonableness of the plaintiff is similarly necessary. However, if both parties understand the realities of their potential litigation outcome, there should be room to move the parties towards a negotiated resolution.

Understanding the “No Settlement” Policy

The rationale behind the “no settlement” policy is simple. First, a company has too many employees that it cannot create the impression that it is willing to pay to rid itself of nuisance claims. Otherwise, it will be faced with countless copycat suits, which at the end of the day, will become costly to the company’s bottom line.

Similarly, where an employee claim is based on some legal principle, companies would rather go to court and get positive legal precedent that it can use to discourage other employees from bringing similar suits.

There is also one additional, yet harsh, practicality that results from the corporate policy to litigate. The employee likely has more to lose reputationally than the company, and the company has a bigger pocket and longer stamina to outlast the employee in a legal battle. Therefore, companies refuse to negotiate and hope that the threat of years of litigation dissuades employees from suing.

These Policies May Not Prevent Employee Litigation

Are these internal mandates to litigate successful in actually preventing litigation? Many companies would emphatically say “yes”. But what metrics are used to support this? The reality is that the nature of litigation alone discourages employees from suing their current or former employers. Every employee prior to filing litigation should already consider the obvious downside to their reputation and hireability that stems from filing an employment litigation. A company’s internal policy to not settle may exacerbate this hesitancy to sue, but are employees even aware of the policy? For obvious reasons, it is not a policy that companies outwardly tout or market (i.e., “If you sue us, we’ll drag you through the mud and outlast you").

Even the most stubborn of these companies, however, will inevitably still face employee litigations as an unavoidable cost of doing business. Aside from litigation costs, a decision to litigate is also taxing on in-house counsel and other internal resources, including, for example, the personnel that will be fact witnesses. Moroever, for in-house counsel, defending a “no settlement” policy can be challenging. As any in-house attorney responsible for litigation budgeting can attest to, Chief Financial Officers loathe carrying hefty legal fees on the balance sheet. Accordingly, if there is a way to less expensively resolve the suit and reduce the legal spend on the balance sheet, it becomes hard to avoid the conclusion that sometimes settling may be better than litigating. It is also important to remember that just because litigation has started, doesn’t mean that it always makes sense to litigate to trial. If trial could mean a negative outcome twice the amount of an

available settlement, litigating purely out of principle is not always in a company's best interest.

Instead of a blanket policy to never settle, companies should employ a cost-benefit analysis that explores whether its decision to litigate actually discourages future litigation, or whether it is simply just costing the company years of unnecessary litigation expenses and distraction.

Three Instances Where Mediation May Benefit a Company.

1. There may not be as much upside to litigation when the dispute is individualized and personal in nature.

If there is no novel legal issue, and the outcome of the litigation will be fact-specific, obtaining a favorable verdict may not be as beneficial because there is little to no precedential value. While not settling demonstrates a company's commitment to litigation over nuisance-value settlements, a fact-specific verdict won't necessarily dissuade another employee with different facts from bringing a similar suit. Moreover, such cases carry risk of a negative verdict. Thus, settling may be more efficient and, the earlier mediation is explored, the more expense the company may save in the long run.

Despite this, many companies are still inclined to stick to their "no settlement" policy to discourage employees who contemplate suing. They may prefer to have the reputation that any suit will take years, cost a fortune, and drag the employee through the mud. However, each company must still justify the drain on its legal budget, not to mention the time and distraction that such a case imposes on its in-house counsel and other personnel. Furthermore, in today's climate, this sort of die-hard litigation strategy could create a reputation of a negative workplace for employees. Accordingly, if there's no or low risk of copycat suits, no legal precedent that needs protecting and no certainty as to how a fact finder may decide, it becomes harder to rationalize years of litigation costs.

2. Before litigation, there may be a small window of opportunity.

If a company is aware of a disgruntled current or former employee who is threatening to commence legal action, considering mediation and settlement before the employee pulls the trigger may be worth exploring. Pre-filing of a lawsuit may be the single instance where cost-savings outweighs principle. There is no public litigation that curiously gets dismissed, the settlement will be conditioned on confidentiality, and the company's balance sheet won't take as big of a hit as it would after years of litigation. This is true even where a company may view the legal claim as baseless, however, settling those cases are certainly tougher pills for companies to swallow. In the end, the analysis needs to focus on the cost to a company, which in many cases, overwhelmingly favors settling. That being said, in order for a company to agree to settle and get past the perception that it caves to threats, it will still need to analyze the likelihood of potential copycat suits, either by aggressive lawyers or co-workers who previously knew about the dispute.

3. There may downside to protracted litigation in a public forum when the facts could create risk to a company's reputation or ongoing business.

Where the allegations in the complaint are sensational or alarming in nature, litigating them for years could take a toll on a company. In the event such a suit survives a motion to dismiss and continues to discovery, regardless of the ultimate outcome of the case, a company may suffer reputational harm or unwanted scrutiny by regulators, competitors and customers. There are inevitably circumstances where litigating to conclusion is imperative to clear the cloud of suspicion, but innocence must still be balanced against the impact to ongoing or future business from protracted litigation and reoccurring headlines. Moreover, the reality is, the company will likely end up settling the case before trial anyway to avoid the possibility of a negative verdict; it will just be more expensive at that time, and the company will have already taken a hit to its reputation.

Similarly, where early investigation indicates some flaw or mistake in the company's processes, early resolution can provide a company with an opportunity to fix the issue internally before there is public scrutiny or the filing of additional suits. It has a small window of opportunity to turn a negative into a positive and create goodwill among its employees and customers.

"Be stubborn about your goals, and flexible about your methods"—unknown

In conclusion, while a "no settlement" policy may appear to benefit a company's bottom line by preventing employee litigation, it may not be so simple. There are instances where a negotiated resolution through mediation may be better for the company's bottom line than years of expensive litigation.

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